

## **STATUS OF THE CLAIMS**

Claims 1-22 were originally filed in this patent application. In response to the first office action dated 05/08/2008, an amendment was filed on 06/19/2008 that cancelled claims 1-6 and 13-22, and amended claims 7-8 and 10-11. In response to the second office action dated 10/17/2008, an amendment and RCE were filed on 01/16/2009 that amended claims 7-8 and 10-11, and added claim 23. In the pending office action dated 03/09/2009, claims 7-12 were rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,745,879 to Wyman in view of U.S. Patent No. 6,012,032 to Donovan *et al.* (hereinafter “Donovan”). Claim 23 was rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent Application 2002/0169725 to Eng. No claim was allowed. In this amendment, claims 7-12 have been cancelled. Claim 23 is currently pending.

## **REMARKS**

### **Rejection of claims 7-12 under 35 U.S.C. §103(a)**

The examiner rejected claims 7-12 under 35 U.S.C. §103(a) as being unpatentable over Wyman in view of Donovan. Claims 7-12 have been cancelled herein and therefore need not be addressed.

### **Rejection of claim 23 under 35 U.S.C. §103(a)**

The examiner rejected claim 23 under 35 U.S.C. §103(a) as being unpatentable over Eng. Eng teaches management and allocation of software licenses. The claims recite “providing metered capacity of a plurality of processors on demand in a computer system.” Nowhere does Eng teach or suggest providing metered capacity of a plurality of processors on demand as expressly recited in claim 23. Eng does teach reallocating software licenses when a node fails, but nowhere does Eng teach or suggest any type metering of processors on demand. As a result, claim 23 is allowable over Eng.

In addition, Eng does not teach the other limitations recited in claim 23. Claim 23 recites:

... (C) when the total processor usage determined in step (A) exceeds the base processor usage determined in step (B), performing the steps of:  
expiring all timed-out usage windows for all of the plurality of processors;

The examiner rejected the limitation above related to expiring all timed-out usage windows by citing paragraphs 11, 12, and 60 of Eng, relying upon the language “identifying and deallocating resources to failed nodes.” Applicant respectfully asserts Eng does not teach or suggest expiring anything that can be reasonably read on timed-out usage windows recited in claim 23. Because the examiner did not identify any teaching in Eng that allegedly reads on the timed-out usage windows in claim 23, the examiner has failed to establish a prima facie case of obviousness for claim 23 under 35 U.S.C. §103(a).

In the rejection, the examiner states one of ordinary skill in the art would be motivated to apply the teachings of Eng to processors. Even if this were correct, the examiner’s rejection would only have merit if Eng teaches expiring all time-out usage windows for all software licenses in Eng. However, Eng has no such teaching. There is no such thing in Eng as a timed-out usage window for a software license. As a result, claim 23 is allowable over Eng.

Claim 23 also recites, “selecting one of the plurality of processors.” The examiner rejects this limitation citing paragraph 60 of Eng. Nowhere does paragraph 60 teach or suggest selecting one of the software licenses.

Additionally claim 23 recites:

... when the selected processor is unbilled, determining whether there is unused billed capacity assigned to one of the other of the plurality of processors; ...

Because the examiner has equated the software licenses in Eng to the processors in claim 23, the examiner's rejection would have merit only if Eng teaches selecting a software license, and when the selected software license is unbilled, performing the actions recited in claim 23. As stated above, nowhere does Eng teach or suggest selecting one of the software licenses. Furthermore, Eng does not teach or suggest "when the selected software license is unbilled." This is where the examiner's rejection really falls apart. A software license in Eng is a license that has already been paid for. It is true in Eng the number of users may exceed the number of licenses, but each license in Eng is a license that has already been paid for. Thus, it is impossible for any license in Eng to be unbilled as recited in claim 23. For this reason alone, claim 23 is allowable over Eng.

Claim 23 also recites:

. . . when there is unused billed capacity assigned to one of the other of the plurality of processors, assigning the unused billed capacity assigned to the one of the other of the plurality of processors to the selected processor;

The examiner rejects the limitations quoted above citing paragraph 60 of Eng, specifically the language "identifying and freeing up resources not in use." However, nowhere does Eng, in paragraph 60 or elsewhere, teach or suggest the language used by the examiner to characterize Eng. In fact, a text search of Eng for the words "identify" and "freeing" reveal that each word is only used once and in a different context than the one alleged by the examiner. This phrase is a fabrication by the examiner and is not found in Eng or supported by Eng.

Because the examiner has equated the software licenses in Eng to the processors in claim 23, the examiner's rejection would have merit only if Eng teaches when there is unused billed capacity assigned to one license, assigning the unused billed capacity to another license. When examined in this light, one can readily see the examiner's mapping of Eng on the limitations in claim 23 does not make sense. A software license

in Eng is a paid license to use a software program. Nowhere does Eng teach or suggest assigning unused billed capacity of one software license to a different software license. Failing over a license to another user, as taught in Eng, does not read on the limitation “assigning the unused billed capacity assigned to the one of the other of the plurality of processors to the selected processor” as expressly recited in claim 23. Eng does teach effectively assigning a software license assigned to one user to a different user. Note, however, a user is not a processor, nor is a user a software license. Eng does not teach or suggest “assigning the unused billed capacity assigned to the one of the other of the plurality of processors to the selected processor” as recited in claim 23. For this reason alone claim 23 is allowable over Eng.

Claim 23 additionally recites:

... when there is no unbilled capacity assigned to any of the other of the plurality of processors, billing a predetermined resource-time for the selected processor.

The examiner rejects the above limitation citing paragraph 66 of Eng, specifically the language, “grace period allows an administrator to purchase additional resources.” The grace period in Eng does not read on the limitations in claim 23 quoted above. The grace period allows a certain amount of time for a system administrator to purchase additional licenses when not enough licenses are owned. In claim 23, a predetermined resource-time is billed. Nowhere does Eng teach or suggest billing a predetermined resource-time as recited in claim 23.

For the many reasons given above, claim 23 is allowable over Eng, and applicant respectfully requests reconsideration of the examiner’s rejection of claim 23 under 35 U.S.C. §103(a).

### Conclusion

In summary, Eng does not teach, support, or suggest the unique combination of features in applicant's claim presently on file. Therefore, applicant respectfully asserts that applicant's claim is allowable. Such allowance at an early date is respectfully requested. The Examiner is invited to telephone the undersigned if this would in any way advance the prosecution of this case.

Respectfully submitted,

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